

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTINE HARRIS,

Defendant-Appellant.

UNPUBLISHED

July 17, 2003

No. 239722

Wayne Circuit Court

LC No. 01-003932

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to twenty to thirty years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. She appeals as of right. We affirm.

I. Background Facts

Defendant's convictions in the instant case arise out of the shooting death of Rhonda Hankins. On June 22, 2000, Rhonda and her sister, Jacenta Hankins, were attending a birthday party for Ixchel Campbell at Juanita's Lounge in Detroit. At trial, Jacenta testified that she knew defendant from the neighborhood and that she saw her at Juanita's Lounge on the night in question. According to Jacenta, defendant intentionally "bumped" into her inside the bar that evening. Jacenta also testified that she overheard defendant telling someone in the bathroom, "I'm killing me a bitch tonight. A bitch going to die tonight." Jacenta asserted that she did not know who defendant was referring to and that she had never had any problems with defendant in the past. However, she claimed that defendant had called Rhonda about a year before the shooting and threatened to kill her for talking with the police.

At approximately 1:30 a.m., all the patrons inside Juanita's Lounge were asked to leave. After leaving the bar, Jacenta, Rhonda, and Jahmal Leonard, Jacenta's boyfriend, stood outside the building talking. Jacenta testified that she was having an argument with Jahmal because she had recently learned that he was seeing defendant. Apparently, defendant, who was sitting in a nearby vehicle, observed Jacenta and Jahmal speaking to each other and called out to Jahmal. When Jahmal failed to respond, defendant pulled the vehicle closer, stepped outside, and fired

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

into the air twice with a handgun. According to Jacenta, defendant then began to walk around the vehicle toward Rhonda. As defendant approached, Rhonda asked defendant what the gun was for and told her that she would not let her harm Jacenta. Jacenta claimed that defendant responded by firing at Rhonda's foot and then lifting the gun and shooting her in the abdomen. According to Jacenta, Rhonda never attempted to walk toward or otherwise attack defendant. Ms. Campbell's trial testimony essentially supported Jacenta's version of the events leading up to the shooting. After defendant drove away, Jahmal and Jacenta took Rhonda to the hospital where she died from a single gunshot wound to her abdomen. The medical examiner testified that there was no evidence of close range firing on Rhonda's skin.¹

The police took two statements from Jacenta at approximately 3:30 a.m. and 6:15 p.m. on the day of the shooting. On cross-examination, Jacenta admitted that she never mentioned anything during these statements to the police about defendant purposefully bumping her in the bar or threatening to kill someone. Jacenta further acknowledged that in her initial description of the shooting to police she stated that Rhonda began walking toward defendant after the two shots were fired in the air.

Ann Sanders testified that defendant came to her home on the night in question and informed her that she had just shot a young lady. Ms. Sanders stated that defendant subsequently showed her the handgun wrapped in a towel and explained that she was defending herself. According to Ms. Sanders, defendant told her that she was walking toward Jahmal and only fired the gun when Rhonda started to rush her. After expressing to defendant that she was going to get in trouble, Ms. Sanders claimed that defendant stated, "you know I'm going to defend myself" and then proceeded to give her a "high-five."

II. Prosecutorial Misconduct

Defendant initially argues that the prosecution denied her a fair trial when it improperly appealed to the jury's sympathy during closing arguments. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant failed to object to this alleged misconduct, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

According to defendant, the prosecutor committed error when it made the following comments during closing argument:

As I told you when we first started this case, it was simply tragic and tragically simple. You see, Rhonda Hankins would have been celebrating her son's, her youngest son's birthday two weeks from the night defendant gunned

¹ According to the medical examiner, there would have been soot or gunpowder stippling on Rhonda's skin if she had been shot within approximately two feet of defendant.

her down on Schaefer in Detroit. That would have been the first. She didn't make it to that birthday party. That would begin a long line of firsts that Rhonda Hankins will not share with her children.

First day of school, first baseball game. Miss Hankins will not share in encouraging and supporting her children in their first goals, first aspirations. She will not be there to comfort her children in those first disappointments and heartbreaks that we know shall come. And that's all because of the actions of the defendant.

The defendant robbed those children of their mother on June 22nd, the year 2000. The defendant stole those children's mother from them on that night.

It is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). While the prosecutor's statements in this case could arguably be considered as appealing to the jury's sympathy, we find no error warranting reversal. The instant comments were brief in the context of the prosecutor's closing argument and were not so inflammatory as to cause prejudice. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Further, any prejudice could have been cured had defendant made a timely objection and the trial court provided a curative instruction. *Schutte, supra* at 721. We also note that the jury was instructed not to allow sympathy to influence its decision. *Watson, supra* at 592. On this record, defendant had failed to establish plain error affecting her substantial rights. *Carines, supra* at 763-764.

III. Directed Verdict

Defendant next asserts that the trial court erroneously refused to grant a directed verdict on the first-degree premeditated murder charge. We disagree. This Court reviews a trial court's decision on a motion for a directed verdict de novo to determine "whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Aldrich, supra* at 122.

First-degree premeditated murder is a specific intent crime and requires the prosecution to establish that "the defendant killed the victim and that the killing was . . . 'willful, deliberate, and premeditated . . .'" *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). To premeditate means that a person thinks about an action beforehand. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Whereas deliberate means to measure and evaluate the major facets of a problem or choice. *Id.* "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Circumstantial evidence may constitute sufficient proof of both premeditation and deliberation. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

On appeal, defendant claims that the circumstances of the shooting in this case did not support an inference that she possessed a "premeditated, deliberate intent to murder [Rhonda]." Rather, defendant asserts that the shooting occurred during a confrontation where emotions were high and that she did not have a sufficient opportunity to reflect on her actions. Viewing the

evidence in the light most favorable to the prosecution, however, the evidence shows that defendant verbally threatened to kill someone before any confrontation occurred. Defendant then sat in a vehicle and observed the Harris sisters and Jahmal before getting out and approaching them with a loaded handgun. The evidence further reveals that defendant fired this gun at least three times, twice in the air and once at Rhonda's feet, before actually pointing it at Rhonda's stomach and pulling the trigger. From these facts, a reasonable finder of fact could conclude that defendant acted deliberately and with premeditation. Thus, the trial court properly denied defendant's request for a directed verdict.

IV. Self-Defense Jury Instruction

Defendant next maintains that the trial court erroneously failed to *sua sponte* instruct the jury on self-defense and imperfect self-defense. We disagree. This Court generally reviews claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 593 (1996). However, because defendant failed to preserve this argument below, our review is again limited to plain error affecting her substantial rights. *Carines, supra* at 763-764.

It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions must include all the elements of the charged offenses and shall not exclude any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "However, a trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request." *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).

When the trial court denied defense counsel's request for an instruction on involuntary manslaughter, it noted that it would provide an instruction on voluntary manslaughter because there appeared to be evidence of imperfect self-defense. However, defense counsel never specifically requested an instruction on self-defense or imperfect self-defense. See *id.* Moreover, a review of the record indicates that defense counsel waived review of this issue when he expressed satisfaction with the trial court's instructions. *People v Tate*, 244 Mich App 553, 558-559; 624 NW2d 524 (2001). A party waives review of an issue by intentionally relinquishing or abandoning a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); see also *Tate, supra* at 558-559. Consequently, defendant has failed to establish error requiring reversal. *Carines, supra* at 763-764.

V. Ineffective Assistance of Counsel

Defendant ultimately claims that she was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights. *Carines, supra* at 763-764.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish

ineffective assistance of counsel, defendant must prove: (1) that her counsel's performance was so deficient that she was denied her Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced her to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In order to demonstrate that counsel's performance was constitutionally defective, a defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *Id.* at 600.

Defendant alleges that her defense counsel was constitutionally ineffective for failing to object to the prosecution's comments during closing arguments. However, as previously noted, the statements were not so inflammatory as to be labeled prejudicial. Because the evidence supporting defendant's convictions was overwhelming, defendant has failed to show that he was prejudiced by the prosecution's comments. *Id.*

Defendant next avers that her counsel was ineffective for failing to request an instruction on self-defense or the imperfect right to self-defense. A defendant may claim self-defense if the circumstances indicated that the defendant honestly and reasonably believed that she was in imminent danger of death or great bodily harm and that it was necessary for her to utilize deadly force. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). However, as a general rule, a defendant may not claim self-defense where she used excessive force or was the initial aggressor. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). Evidence that a defendant's belief of imminent danger was either unreasonable under the circumstances or dishonest is sufficient to defeat a claim of self-defense. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

In this case, defendant could not use self-defense as a defense because the evidence clearly showed that she was the initial aggressor. *Kemp, supra* at 323. Moreover, after a thorough review of the record, it appears to this Court that the circumstances did not merit defendant's use of deadly force. Although able to retreat to her vehicle, defendant decided to shoot an unarmed individual because she was "rushing her." See *Riddle, supra* at 119 (the necessity element in self-defense requires a defendant to avoid the use of deadly force if possible). In this case, there is no evidence that Rhonda ever touched defendant. We further note that the medical examiner testified that the gunshot wound was not inflicted from close range. Therefore, defendant has failed to establish that self-defense was a viable defense in this instance.

In light of this analysis, we also find that the doctrine of imperfect self-defense is inapplicable to defendant's actions. This doctrine is a qualified defense that can serve to mitigate an act of second-degree murder to voluntary manslaughter. *Kemp, supra* at 323. "Although the Michigan Supreme Court has not yet considered the viability of the theory of imperfect self-defense, panels of this Court have recognized the doctrine where a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor." *Id.* at 323; see also *People v Amos*, 163 Mich App 50, 57; 414 NW2d 147 (1987). Because the facts do not support the claim of self-defense, the doctrine of imperfect self-defense is also unavailable. See

People v Butler, 193 Mich App 63, 67; 483 NW2d 430 (1992). Accordingly, defendant cannot show that she was prejudiced by her counsel's failure to request these instructions. *Carbin*, *supra* at 600.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper
/s/ Charles L. Levin